Justice in the Palestine-Israel Conflict

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Justice is at the center of the conflict over historic Palestine. When I wrote a book on the conflict, I titled it *Palestine and Israel: A Challenge to Justice*. The phrase "a challenge to justice" was not original with me. I took it from Commander E. H. Hutchinson, an American military officer who served as chair of the Mixed Armistice Commission that monitored the 1949 Israel-Jordan armistice.

Hutchinson saw at first hand the aftermath of the establishment of a Jewish state in Palestine, as he monitored the armistice. His observations led him to conclude that the project of a Jewish state in Palestine had been misguided. He describes how Israel continued to push Arabs across the border in the early 1950s. He explains that his commission confirmed more armistice violations by Israel than by Jordan.

More generally, Hutchinson was critical of the major powers for their 1947 decision to recommend that a part of Palestine be made into a Jewish state. In Hutchinson's view, the major powers, by promoting partition of Palestine into an Arab and a Jewish state, "overran the rights of the indigenous population of Palestine -- the Arabs. Every step in the establishment of a Zionist state," Hutchinson wrote, was "a challenge to justice."

A justice perspective is useful in examining the Palestine-Israel conflict, and the role the international community has played in the conflict. Justice, of course, does not provide a ready lens with which to view the issues. Each side in the conflict has its own sense of what justice requires. For the Jews who have migrated to Palestine, their unhappy experience in mid-twentieth-century Europe sets the background from which they assess the justice of what has occurred in Palestine. For the Arabs of Palestine, the Jewish experience in mid-twentieth-century Europe does not provide an adequate basis for overriding their rights to the land they have inhabited since ancient times. For the international community, the task is to determine which justice is appropriate to serve as a policy guide, or if not one or the other, then perhaps some combination of the two versions of justice.

Beyond these issues lies that of the role that justice has, or has not, played in the development of the conflict. Disposition of territory is often a product of complex relationships among peoples and governments. The concept of self-determination, on which both sides rely, existed in only nascent form at the time of

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1 President's Club Professor in Law, Ohio State University. LL.B., M.A. 1966, Harvard Law School.
4 Id. at 95.
the Great War, when the initial, yet critical, decision was made regarding Palestine. Even today the role of justice in ordering international affairs is hotly debated. Politics and justice are not always the most comfortable of bedfellows.

Justice and the Balfour Declaration

Britain and the United States have been the principal external powers that have affected Palestine. While both were cognizant of justice considerations, those considerations were not always primary in their policy decisions. Britain and the United States did not always view Palestine through the lens of what is just and appropriate for Palestine and its inhabitants. Considerations relating to their own position in the world played a role as well. To the extent that these considerations prevailed over justice considerations, Britain and the United States thought they could manage the situation without dire consequences. Unfortunately, they were wrong in those judgments. The relegation of justice considerations to secondary importance has had disastrous consequences for Palestine and for the Middle East region.

Britain dealt the first blow to justice in Palestine in 1917, when it issued the Balfour Declaration, proclaiming the advisability of a Jewish national home in Palestine. Britain's reasons for issuing the Balfour Declaration lay in considerations of its own advantage. Prime Minister David Lloyd George called an anticipated Jewish entity in Palestine a "garrison-colony" that would serve as a buffer for Egypt and the Suez Canal. Lord Balfour, who as foreign secretary issued the declaration, explained that Britain was acting in disregard of the legitimate interests of the local population: "In Palestine," he said in an August 11, 1919 memorandum to Lord Curzon, who replaced him as foreign secretary, "we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country." Curzon was opposed to the Balfour declaration, viewing it as "an avowed constitution for a Jewish state" in a country whose majority population was Arab. Hutchinson called the Balfour Declaration "the vehicle upon which World Zionism slowly and methodically started to superimpose a state of its own on Palestine."

The United States supported Britain on its Palestine policy, while fully realizing that the Zionist project was at odds with justice. US President Woodrow Wilson espoused self-determination at the post-war Versailles Conference as a prerequisite for a

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5 Documents on British Foreign Policy 1919-1939, 1st ser. (4), at 345.
7 Hutchinson, supra note 2, at xix.
lasting peace. In 1919 Wilson sent a fact-finding team to Palestine in order to assess the situation there. The team reported to Wilson that "the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase." The team found that "the non-Jewish population of Palestine -- nearly nine-tenths of the whole -- are emphatically against the entire Zionist program." Despite receiving this report, which showed that self-determination was being ignored, Wilson backed Britain in its support for Zionism.

The League of Nations, as it organized a mandate system for the administration of territories taken during the war, arranged a mandate for Britain over Palestine. The idea of the mandate system was to promote self-determination, with European oversight for a period of time, leading to independence. Britain, which had taken Palestine during the war, was to get a mandate over Palestine.

At Britain's request, the League included in the terms of the mandate the language of the Balfour Declaration. Objection was raised in the House of Lords that elevating Balfour's statement to formal policy in this way would violate self-determination in Palestine. The House of Lords even passed a resolution urging the government to reject the mandate over Palestine because of the Balfour language.

The government accepted the mandate, however, and as mandatory power promoted Jewish migration to Palestine, even though it soon became obvious that Curzon's fears were being realized. Quincy Wright, an international lawyer, visited Palestine in 1925 and reported the view of the Arabs that the Balfour Declaration was "a gross violation of the principle of self-determination proclaimed by the Allies." Wright agreed, saying that the Balfour Declaration was "difficult to reconcile with the claim of the Arab population to self-determination." When Palestine's Arabs staged protests in 1929, the British government appointed an enquiry commission, which reported that the Arabs feared "that by Jewish immigration and land purchase they may be deprived of their livelihood and in time pass under

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10 Mandate for Palestine, art. 2, League of Nations, 8 Official Journal 1007 (1922).
11 Parliamentary Debates [House of Lords], 5th ser., vol. 50, col. 1034 (1922).
12 Quincy Wright, The Palestine Problem, 41 Political Science Quarterly 382, 392 (1926).
13 Quincy Wright, The Palestine Conflict in International Law, in Major Middle Eastern Problems in International Law (M. Khadduri, ed.) 13, 26 (1972).
the political domination of the Jews."\(^{14}\)

With funds from outside sources, the Zionist organization bought land in patterns to create a land base for a Jewish state. Arab tenant farmers were displaced. John Chancellor, Britain's high commissioner for Palestine, seeing that British policy was leading the country to crisis, recommended to his government that it suspend Jewish immigration and land purchases.\(^{15}\) The government disregarded Chancellor's recommendation.

Justice in Palestine was eclipsed even more as the Nazi party, in power in Germany, put pressure on German Jews. Britain let the Jewish population of Palestine double between 1931 and 1935.\(^{16}\) In response, the Arabs took to civil disobedience, commercial strikes, non-payment of taxes, and even attacks on Jewish settlements. Their demands were the rejected demands of the high commissioner: an end to immigration of European Jews, and cessation of land purchases by the Zionist organization.

The Jews of Germany were at risk, to be sure, even more seriously than most of them realized. Justice called for succour for them. Yet admitting them to Palestine, as part of a project to take it over, violated justice there. Mahatma Gandhi viewed Britain's allowance of Jewish migration to Palestine as inconsistent with justice. "It is wrong and inhuman," he wrote in 1939, to impose the Jews on the Arabs. What is going on in Palestine today cannot be justified by any moral code of conduct."\(^{17}\)

Britain, in 1939, finally determined to restrict Jewish immigration: a total of 75,000 for the following five years.\(^{18}\) This shift in British policy brought a Jewish armed revolt. As World War II ended, Britain saw no solution. Its promotion of European Jewish immigration had taken Palestine into a tunnel that seemed to have no light at the other end.

Justice and the partition proposal

World War II only made matters worse. Jews liberated from Nazi camps wanted to leave. Surveys of displaced Jews showed they


\(^{16}\) Shabtai Teveth, Ben-Gurion and the Palestinian Arabs: From Peace to War 125 (1985).


\(^{18}\) Palestine: Statement of Policy, arts. 10, 14, 16, May 1939, Commander Paper 6019.
wanted to go West, but Western countries did not want them, and
the Zionist organization urged Western countries not to take them.
It viewed the long-term solution for Jews as a state in Palestine,
even if it meant forcing Jews to go there who had no interest.

The horrific experience Jews had undergone required that they
be offered an opportunity to resettle elsewhere. But Arnold
Toynbee, the British historian, found "neither merit nor justice"
in "compensating victims [the Jews of Europe] at the expense of
innocent third parties [the Arabs of Palestine]."19 Again, Europe's
considerations were at the forefront as Britain asked the United
Nations to find a solution. The UN opted for an approach just as
wrongheaded as the Balfour policy. It took up the Palestine issue
not only as one of what should become of Palestine, but as one of
what to do with the displaced Jews in central and eastern Europe.

The two issues could not be handled together and still
provide a just solution for Palestine. The issues of the displaced
Jews was given priority as the UN General Assembly, then
controlled by the Western powers, devised a plan to set up two
states in Palestine, one Jewish and the other Arab. The plan as
adopted would have given most of the territory of Palestine to a
Jewish state, even though Jews owned only 6% of the land and
numbered only one-third of the population, most of them recent
migrants.20

Loy Henderson, the U.S. State Department official responsible
for Middle Eastern policy, condemned the partition plan in terms
reminiscent of Curzon's condemnation of the Balfour Declaration.
Henderson said that the partition plan ignored "self-determination
and majority rule."21

Voices seeking justice were not met with totally deaf ears.
The UN Security Council, by early 1948, understood that partition
would not work and began to devise a plan for a temporary
trusteeship over Palestine. As Hutchinson recounts, the Security
Council "saw that [the partition plan] was an impracticable
solution and took steps towards its annulment."22 Nonetheless,
"[t]hose spearheading the Zionist drive," Hutchinson wrote,
"immediately set forth to implement the Partition Plan by driving
the Arabs from the area scheduled to go under Jewish control.
Terrorist acts mounted, bombings were frequent, the Arab village
of Dier Yasin was wiped out."23

Deir Yassin, in the more widely accepted spelling, was an
Arab village on the outskirts of Jerusalem. In April 1948, with
Britain still in control of Palestine, Jewish militias overran

21 The Director of the Office of Near Eastern and African
Affairs ([Loy W.] Henderson) to the Secretary of State, Sep. 22,
22 Hutchinson, supra note 2, at xxiii.
23 Hutchinson, supra note 2, at xxiii.
Deir Yassin and killed 250 unarmed villagers. An official of the International Committee of the Red Cross was able to gain immediate access to confirm the slaughter.\textsuperscript{24} By the time Britain withdrew in May 1948, the Jewish militias had driven out several hundred thousand Arabs, by direct expulsion or intimidation. By late 1948 it drove out several hundred thousand more.

Remarkably, the international community stood by and did nothing to reverse this land takeover and ethnic expulsion. The UN Security Council was conspicuously silent, even though the Jewish Agency's unilateral declaration of statehood thwarted its efforts to find an alternative to partition. In 1949, the United Nations even admitted Israel to UN membership.

Justice and the displaced Arabs

Israel's continuing control of the bulk of Palestine's territory left one glaring problem that the international community could not avoid. The Arabs expelled in 1948 numbered half a million to one million, depending on which estimate one accepts. Israel's government let Jews migrating to Israel move into their houses and take over their lands. By its Resolution 194 in December 1948, the UN General Assembly called on Israel to repatriate the Arabs.\textsuperscript{25} By the same resolution, the General Assembly set up a Conciliation Commission for Palestine to work towards an overall settlement of the Palestine problem, and in particular to urge Israel to repatriate the displaced Arabs.

Israel responded that it could not address repatriation absent an overall political settlement with the Arab states. Representing the United States in the UN General Assembly, Dean Rusk decried that stance, saying that the displaced Arabs should not be "pawns to a political settlement."\textsuperscript{26} In other words, their repatriation was a matter of justice.

Israel, intent on a Jewish state with a Jewish population majority, refused serious discussion of repatriation. In 1950, the UN Conciliation Commission for Palestine visited Prime Minister David Ben Gurion and "asked if the Government of Israel accepted the principle established by the General Assembly's resolution, permitting the return to their homes of those refugees who expressed the desire to do so."

In reply, Ben Gurion questioned the Committee's interpretation of UN General Assembly Resolution 194. The resolution, in referring to the displaced Arabs, called on Israel to repatriate those who desired to "live at peace with their neighbours" in Israel. "In Mr. Ben Gurion's view," the Committee

reported, "this passage made the possibility of a return of the refugees to their homes contingent, so to speak, on the establishment of peace: so long as the Arab States refused to make peace with the State of Israel, it was evidence that Israel could not fully rely upon the declaration that Arab refugees might make concerning their intention to live at peace with their neighbours."²⁷

To the General Assembly, the phrase referring to those desiring to live at peace simply meant those who were willing to return to their home areas despite the fact that Israel was now in control there. In Resolution 194, the option was clearly that of an individual displaced Arab. Ben Gurion's unfounded interpretation of Resolution 194 was a cover for the fact that Israel, having expelled the Arabs to allow for a Jewish-majority state, was not prepared to let them back.

Ben Gurion's argument went to the timing of repatriation. But at the UN General Assembly, Israel made an argument that went to the heart of the repatriation issue. Arab state delegates had argued that Israel, consistent with international law, must recognize Israeli nationality for the displaced Arabs. They had been nationals of the defunct mandate Palestine and Israel was the new sovereign. The argument as made by Abba Eban, Israel's delegate in the General Assembly ran as follows: "He then came to the argument, invoked by a number of delegations, that the Arab refugees were entitled to Israeli citizenship, and that therefore Israel was under a moral, if not legal, obligation to secure their immediate repatriation. In that connexion, he pointed out that under the provisional national law the only citizens of Israel were those who had been registered toward the end of 1948 for the first elections to the Knesset. Moreover, the idea of citizenship had a moral aspect which must be taken into account: a citizen did not only have rights, he also had duties; and one of the most important functions of government was to reconcile the rights and duties of citizens." Eban said that Arabs could not be expected to defend Israel militarily.

The Arab argument was correct in law. A new sovereign, as Israel was, is bound to recognize the nationality of existing inhabitants. It may not de-select those it prefers to exclude.²⁹ When Israel adopted a Nationality Law in 1952, it drew a definition of Israeli nationality that excluded the displaced

Arabs. Only the Arabs who remained after 1948 qualified.  

A 1930 draft convention on nationality reflected the position in customary international law: "those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of its law they decline the nationality of the successor state." The drafters, a research team at the Harvard Law School, found this rule in customary law.

An expulsion of Greeks by Turkey, and of Turks by Greece, a decade earlier was cited by Eban to deny the existence of a legal norm prohibiting expulsion. The two situations differed in that Israeli's expulsion was carried out as it was unlawfully taking over the territory in question. They also differed in that the expulsions were mutual and arranged by treaty. Turkey first expelled Greeks. Greece, unable to convince Turkey to repatriate the Greeks, in turn expelled Turks from Greece and formalized the arrangement by a treaty with Turkey. Even so, the mutual expulsions had been widely regarded as unlawful, as violative of the rights of the persons forcibly displaced. Lord Curzon called the treaty "a thoroughly bad and vicious solution."

Eban's argument that the Arabs could not be loyal to Israel and therefore need not be accorded its nationality suffered two flaws. First, there were Arabs within the territory Israel had taken, and unless they were all to be expelled they would have to be deemed its nationals. Indeed, the Nationality Law adopted in 1952 declared them to be Israeli nationals. The question of military service was handled separately. Second, in international law a state has no ground to exclude from nationality those whose loyalty it questions. Many states of the world include minority groups that governments find troublesome. But it has never been suggested that a government could de-nationalize them.

The UN General Assembly did not forget the repatriation issue. Each year, down to the present, it has adopted a resolution deploring Israel's refusal to repatriate and has demanded that it comply with Resolution 194.

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30 Nationality Law, art. 3, 6 Laws of the State of Israel 50 (1952).
32 Id. at 61 (comment to art. 18).
33 Convention concerning the Exchange of Greek and Turkish Populations (Lausanne), January 30, 1923, art. 1, 32 L.N.T.S. 75.
34 E. Reut-Nicolussi, Displaced Persons and International Law, 1948(2) Recueil des cours (Hague Academy of International Law) 1 at 29.
36 See, e.g., Assistance to Palestine refugees, Res. 58/91, 7
To the UN General Assembly, the circumstances of the departure of the displaced Arabs was irrelevant. Israel denied having expelled the Arabs. Although that denial is not borne out by the evidence, it is unlawful for a state to exclude the displaced, regardless of the reasons for their departure. A state is required under international law to allow the return of persons who either hold or are entitled to its nationality.

Justice as the Arab rallying cry

The Arab side continued to ground its appeals to the international community in the language of justice. "The Arabs firmly believe," Hutchinson wrote in 1955, "that the West is aware of a departure from justice in the Israel-Arab problem and that rectification will be made in the near future."\footnote{Hutchinson, supra note 2, at 99.}

The Jewish Agency, and after it the Israeli state, cited justice as being on their side. Jews were not safe in Europe. If statehood could be established in Palestine, never again would the atrocities visited upon the Jews by the Third Reich be repeated. The Hebrews, moreover, had inhabited portions of Palestine in ancient times, and the Jewish people had retained a spiritual connection to the area.

Israel's appeals to justice were, however, more difficult to sustain. To gain protection for the Jews a people would be displaced from the land they had inhabited continuously since ancient times. The Arabs of Palestine originate in the Canaanites who pre-date the Hebrews in their occupation of modern-day Palestine. In time, Israel's principal argument was that it was there, and that it had managed to convince the international community to let it be there. Its appeals to justice or to legal considerations were asserted less often.

A flicker of hope for justice appeared in 1956, when Israel, in collaboration with France and Britain, invaded Egypt and occupied the Gaza Strip. Ben Gurion declared that Gaza belonged to Israel and refused to withdraw, despite calls from the UN for him to do so. Israel withdrew only after US President Dwight Eisenhower threatened Ben Gurion with a cutoff of US economic aid to Israel.

The hope was short-lived, however, because for the United States cold war considerations soon assumed prominence. In 1957, Eisenhower adopt as policy what came to be called the Eisenhower Doctrine, calling for US intervention in the Middle East, to thwart perceived Soviet intentions in the region.\footnote{President Asks for Authorization for U.S. Economic Program and for Resolution on Communist Aggression in Middle East, 36 \textit{State Dept. Bull.} 83 (1957) (Message of President to Congress, January 5, 1957).} At Eisenhower's request, the US Congress adopted a Joint Resolution To Promote

Peace and Stability in the Middle East, which concretized the Eisenhower plan.\(^39\)

It was this cold war approach that led the United States to make the fateful decision to give Israel military aid.\(^40\) Israel would serve as a counterweight to Arab states. This aid allowed Israel to persist in its refusal to repatriate the displaced Arabs and to decline meaningful accommodation with the Arab states.

Justice and the 1967 war

Justice failed to occupy a prominent place in the international community's response to Israel's military invasion and occupation in 1967 of the sectors of Palestine it had failed to gain in 1948. In the UN Security Council, Egypt charged aggression by Israel. Israel told the Council that Egypt had attacked first: "[O]n the morning of 5 June," Abba Eban told the Council, "when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hashelosha we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the United Nations Charter, Israel responded defensively in full strength." Eban also claimed that "approaching Egyptian aircraft appeared on our radar screens."\(^41\)

These assertions were untrue. Egypt's entire force of fighter aircraft was on the ground, where it was bombed and destroyed by the Israeli air force.\(^42\) Israel never produced evidence of attacks on Israeli villages and soon stopped making that claim.

The United States helped Israel in its deception by keeping silent as Israel claimed it had been attacked by Egypt. Prior to June 5, Israel was in communication with the United States about its plan to invade Egypt. Israel wanted assurance that if it invaded, the US would not act against it, as it had done in 1956.\(^43\) US President Lyndon Johnson later claimed that he cautioned Israel against invading.\(^44\) But when Israel invaded and falsely informed

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the UN Security Council that Egypt had attacked first, the United States did not reveal Israel's lie. Arab delegates vainly proclaimed that Egypt had not attacked, but the UN Security Council never investigated and never resolved the discrepancy.

The Security Council repeatedly and ineffectually called for a cease fire, but it took no action any more forceful, thereby allowing Israel to extend its control over the Gaza Strip, Sinai Peninsula, Golan Heights, and the West Bank of the Jordan River. In its major resolution on the conflict, adopted only half a year later, the Council called on Israel to withdraw, but ambiguously linked that call with a call on the Arab states to normalize relations with Israel. This linkage let Israel claim that it could lawfully remain in occupation.

The best remaining hope for justice, or so it seemed in the late 1960s, lay in the unity of the Arab states. By either military action or economic pressure, they alone seemed to have the capacity and, at least potentially, the will to act on behalf of Palestine's Arabs. That hope was dashed when Egypt concluded a separate peace with Israel. Anxious to regain the Sinai Peninsula, which Israel had occupied since the 1967 hostilities, Egypt normalized relations with Israel in 1979.

Justice and a peace process

In the 1980s the UN General Assembly tried to secure a measure of justice when it proposed an international conference premised on the need for Israel to comply with internationally recognized norms. Such a conference was opposed by Israel and by the United States. Instead, the United States organized bilateral negotiations between Israel and the Palestinians, with no understanding that solutions be based on concepts of justice.

First a meeting was held in Madrid, in 1991, and bilateral negotiations followed. The United States, in keeping with Israel's
wishes, said that the Palestine Liberation Organization could not be the Palestinian interlocutor, even though it had been admitted as an observer organization at the United Nations, as representing the Palestinian movement for self-determination.

From the Palestinian perspective, the bilateral process ran the risk of providing approval to an Israeli diktat. Israel, predominant over the Palestinians economically, politically, and militarily, would have no incentive to comply with international norms in the negotiations. Nonetheless, negotiations were arranged in 1991 in Washington, under the auspices of the US Department of State, with the Palestinians represented by a grouping of prominent individuals, and Israel by its government.

The non-PLO negotiators proved less tractable than Israel had expected. They insisted that Israel freeze construction in its settlements in the Gaza Strip and West Bank, as a pre-condition for talks on the issues that separated the two sides. The negotiators' purpose was to ensure that Israel not advantage itself during the time of negotiations. To the Palestinians, additional settlement construction while negotiations over the settlements proceeded would indicate bad faith on Israel's part.

The UN Security Council had repeatedly condemned the settlements as a violation of the law of belligerent occupation. The settlements represented one of the more difficult issues to be negotiated. As an illegal act that threatened the peace, Israel's settlement construction should have been handled by the UN Security Council under Chapter VII of the UN Charter. Chapter VII allows the Council to take economic, diplomatic, and even military sanctions to deal with any threat to the peace. Yet the Council, hamstrung by the threat of US vetoes to protect Israel, never went beyond verbal condemnations of the settlements. As a result, the settlements became an agenda item in the bilateral negotiations.

The Washington process languished. Israel proceeded to expand its settlements, in part to provide housing for the half million migrants it was receiving from the USSR. Then in 1993 Israel decided that it was willing to negotiate with the PLO, and an agreement was reached for interim administration of territory by the PLO in the West Bank and Gaza, and a process to negotiate peace.

That process too stalled, however. Israel continued to expand its settlements, claiming that the 1993 agreement did not forbid it. The PLO responded that the settlements were illegal, apart from any PLO-Israel agreements, but that good faith in the negotiation process additionally required Israel to stop.

The UN Security Council tried to issue at least verbal condemnation of this settlement construction, but the United States, using its veto power, prevented the Council from acting. The United States' rationale was that so long as a bilateral

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process was in place the Security Council should not condemn Israel.

Justice and repatriation

One of the issues the 1993 agreement put on the negotiation table was that of the Palestine Arabs displaced in 1948. Israel shortly dealt a blow on that issue, as it was doing on settlements. A right-of-center government that assumed power in Israel in 1996 gave a new rationale for refusing repatriation to the displaced Arabs, namely, "demographic security."\(^53\) Israel, according to Prime Minister Benjamin Netanyahu, did not want a diminution of Israel's Jewish majority. The new government would oppose "the right of return of Arab populations to any part of the Land of Israel west of the Jordan River,"\(^54\) a position that precluded repatriation not only to Israel, but even to the Gaza Strip or West Bank.

Ben Gurion, it will be recalled argued against repatriation on the ground that peace needed to be negotiated first with the Arab states. By the turn of the twenty-first century, Israel had made peace with Egypt and Jordan. Of Israel's Arab state neighbors, only Lebanon and Syria had yet to conclude peace with it. And negotiations were underway with the P.L.O. Thus, the condition Ben Gurion set was rapidly being achieved.

Eban, it will be recalled, had argued against repatriation by questioning the loyalty of Arabs to Israel. Netanyahu's argument went further still, basing the refusal to repatriate on preserving a Jewish majority. No arguable legal principle permits a denial of repatriation to those so entitled on the basis of their ethnicity.

Principles of justice require that Israel, even at this late date, repatriate the displaced Arabs who desire to return. The UN Security Council, in dealing with hostilities involving an outflow of persons of particular ethnicities, has consistently viewed repatriation as legally required. When hostilities in the Abkhazia sector of Georgia led to an outflow, the Security Council called on Abkhaz authorities to repatriate the displaced, referring to "the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in

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\(^{53}\) Sarah Honig & David Makovsky, Religious issues delay coalition deal, Jerusalem Post, June 17, 1996, at 1 (quoting unnamed aide to Prime Minister-elect Benjamin Netanyahu).

\(^{54}\) Eric Silver, Netanyahu hits first crisis over cabinet line-up, Independent, June 19, 1996, at 10 (statement of Prime Minister Benjamin Netanyahu); Elaine Ruth Fletcher, Peace talks will hinge on Israeli elections: Likud party would try to impose more controls on Palestinians, San Francisco Examiner, May 5, 1996, at A-15 (indicating that Likud position is to oppose return of displaced Palestinians to Israel, to West Bank, and to Gaza Strip).
accordance with international law." In a resolution on Bosnia, which also experienced ethnic population flight, the Security Council stated that "all displaced persons have the right to return in peace to their former homes."

The repatriation issue is being handled today in precisely the setting that Dean Rusk declared in 1948 to be unacceptable, namely, as one issue among others in a negotiation for an overall settlement of the conflict. Israel successfully resisted UN efforts to get it to repatriate apart from other issues. In the negotiations that began in 1999, Israel did precisely what Dean Rusk had feared. It demanded that the P.L.O. drop its demand for repatriation, as a condition for Israel's recognizing territory for a Palestine state.

Justice and territory

To the Palestinians, a demand for a state in that portion of Palestine that Israel did not take in 1948 was modest. This demand represented a serious concession from the original Palestinian position that there be a single state in Palestine. The demand involved recognizing a Jewish state in the bulk of Palestine's territory, a recognition that was all the more difficult because Israel established itself by driving out the majority of the Arabs who lived there.

Thus, when Israel, during the 1999 negotiations, began claiming sectors of the West Bank where it had illegally built settlements, the Palestinians were outraged. The international community had been condemning Israel for these settlements, but now, in the context of bilateral negotiations, there was no one to say "No" to Israel when it put forward these demands.

Israel demanded that Jerusalem be under its sovereignty, even though the international community had never recognized Jerusalem as belonging to Israel. The eastern half, taken by Israel in 1967, was viewed as under Israel's belligerent occupation. The western half, taken by Israel in 1948, was viewed as falling appropriately under an international status. Foreign governments, even those most friendly to Israel politically, have refused to situate their embassies in Jerusalem, because they do not recognize Israel's sovereignty over west Jerusalem.

Justice in Palestine/Israel

Ever since the conflict over Palestine began in the early twentieth century, a tension has been present between considerations of justice for the population of Palestine, on the

one hand, and considerations of European policy on the other. To be sure, considerations of justice were not wholly irrelevant to European policy, as the situation of the Jews in Europe was involved. Nonetheless, as issues of right in the international community have developed, the critical considerations relate to the territory in question. If a population group in State X is in need of a new home, there is no basis in law for imposing that population group on State Y.

As reflected in the analysis above, the "challenge to justice" in imposing an outside population on Palestine was evident from the outset. Woodrow Wilson's fact-finding team and Britain's Lord Curzon foresaw the dire situation that was being created.

The UN Security Council has never exercised its powers under Chapter VII of the UN Charter to deal with threats to the peace, even though the Palestine-Israel conflict has been arguably the most intractable the United Nations has faced. The Security Council did not try to stop the Jewish Agency from taking territory in Palestine in 1948, or from expelling the Arab population. Ethnic cleansing became a serious matter to the Security Council in the Balkans in the 1990s. But in Palestine in 1948, the Council limited itself to verbal calls for cease fires.

In 1967, the Security Council failed to force Israel to withdraw from the Palestinian territory it took by force of arms. And since 1993, the Security Council has been even less active, because of the position of the United States that any Security Council action would erode the bilateral peace process.

Whether justice can be restored is the task now before the international community. It is beyond the scope of this article to formulate proposals. Justice has been overridden for so long that restoring it presents serious problems. Yet in its approach, the international community must understand where the true claims to justice lie, and must make policy to recognize those claims.